

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WENDI C.,

Claimant,

vs.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency.

OAH No. 2011030649

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Visalia, California, on May 2, 2011.

The Service Agency, Central Valley Regional Center (CVRC), was represented by Shelley Celaya, Client Appeals Specialist.

Claimant was represented by her mother, Shaun C.

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUES

Is claimant eligible for regional center services based on a qualifying condition of autism, mental retardation or “the fifth category” (a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation) pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000?¹

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

FACTUAL FINDINGS

1. Claimant is a twenty-two year old woman who resides with her parents and younger brother. She also has a sister who lives away from home attending college. Her medical history includes dual sensory impairments of vision and hearing. She had an initial cochlear implant at seven years of age, and a second implant in December 2006. Claimant received CVRC services from 1992 until 1996 when a determination was made that she was not developmentally disabled. She is currently seeking services due to difficulties with adaptive functioning.

2. The CVRC Eligibility Review Team, consisting of Kao Yang, Ph.D., Staff Psychologist; Ron Marconi, M.D., Consulting Physician; Kelley Hanson, MSN, FNP-C, Nurse Consultant II; and Sidney R. Jackson II, MS, Intake Counselor, met on February 2, 2011 to consider claimant's eligibility. After review, the team determined that claimant "does not demonstrate a developmental disability per Lanterman criteria."

3. The Eligibility Team Review/Closure Note stated that prior to this determination CVRC had referred claimant to Howard Glidden, Ph.D., consulting Developmental Neuropsychologist, for a "profile of cognitive and adaptive function. The assessment concluded that [claimant] demonstrates a diagnosis of Attention Deficit/Hyperactivity Disorder, combined; Mixed Receptive Language Disorder; Reading Disorder; Mathematics Disorder; Disorder of Written Expression; Obsessive-Compulsive Disorder, by history. She was not given an Axis II diagnosis. She actually achieved scores that reflect average nonverbal intelligence."

The Closure Note also explained that claimant was well known to CVRC, having received services from 1992-1996. Her case was closed when it was determined that she was not developmentally disabled. "Documentation indicates that [claimant] in the past has been diagnosed with Noonan's Syndrome, seizures, profound hearing loss and numerous other diagnoses. The Kings County Office of Education indicated that [claimant] also carries a diagnosis of Hypotonia, Asthma, and Attention Deficit Hyperactivity Disorder."

4. On the same date, claimant and her mother were present at the CVRC office for a meeting with Dr. Carol Sharp, Staff Psychologist. Dr. Sharp discussed the eligibility team's decision on eligibility and diagnosis with them.

5. As a result of the eligibility team determination, A Notice of Proposed Action (NOPA) was issued to claimant on February 2, 2011, informing claimant that she did not meet the criteria for CVRC eligibility.

6. Claimant filed a Fair Hearing Request, disputing her ineligibility for services stating, "Tests by Dr. Glidden show [claimant's] adaptive functioning is extremely below average and her overall functioning is declining. These should be viewed as key indicators of a qualifying condition under CVRC guidelines."

7. Shelley Celaya, CVRC Client Appeals Specialist, met with claimant and her mother, informally, to discuss claimant's appeal of eligibility. By letter dated March 18, 2011, Ms. Celaya informed claimant as follows:

After careful review of [claimant's] record it has been determined that she does not meet the criteria for regional center eligibility as defined in W & I Code Section 4512 (a) or 17 CCR 54000. [Claimant] underwent neuropsychological evaluations, by Dr. Howard Glidden, most recently at age 21 and previously at age 17 years 10 months. Neither of these evaluations yielded a diagnosis of Mental Retardation. To the contrary, prior to age 18, [claimant's] Full Scale IQ fell in the low average range at 84. At that time, Dr. Glidden noted that [claimant's] Full Scale IQ was felt to be an underestimate of her true cognitive potential, due to a variability among subtest scores. Although [claimant's] current Full Scale IQ is lower at 75, there continues to exist a significant difference in subtest scores. Most notably scores of 90 in Perceptual Reasoning and 86 in Processing Speed that would not indicate her general intellectual functioning is similar to that of an individual with mental retardation. It is important to note that any decline in functioning that occurred after the age of 18 would not be indicative of a developmental disability. In addition, [claimant] has a documented history of psychiatric disorder, sensory impairment and learning disorders that although could impair her adaptive functioning would not be qualifying conditions for regional center services.

8. Pursuant to the Lanterman Act, section 4500, et seq., regional centers accept responsibility for persons with developmental disabilities. Section 4512 defines developmental disability as follows:

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the "fifth category"], but shall not include other handicapping conditions that are solely physical in nature.

9. California Code of Regulations, title 17, section 54000, further defines the term “developmental disability” as follows:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

10. Welfare and Institutions Code section 4512, subdivision (l), defines substantial disability as:

(l) The existence of significant functional limitation in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

11. Claimant contends that she is eligible for regional center services due to her continual and increasing difficulties with adaptive functioning “which should be considered to be in the lower end of mental retardation or autism.”

12. Carol Sharp Ph.D. is a CVRC Staff Psychologist. She testified that the regional center is limited to serving those consumers that meet the specific definitions of developmental disability outlined in the Lanterman Act. She explained that there may be a variety of reasons for deficits in adaptive functioning, but in claimant’s case the eligibility team determined that there was no evidence of a developmental disability.

13. In reaching that determination, the team considered the results of three neuropsychological evaluations performed by Howard Glidden, Ph.D., Developmental Neuropsychologist. One evaluation was conducted on February 15, 2007, when claimant was 17 years, 10 months. Claimant was referred for evaluation “for assessment of cognitive and neurodevelopmental functioning” for the purpose of assessing “cognitive integrity and to provide recommendations as appropriate.”

At the time of this assessment, claimant was enrolled “as a junior at Hanford West High School where she attends a regular curriculum with one class for study skills, and pull-out from the study skills course for deaf education and speech.”

14. Dr. Glidden noted in his report that he had previously evaluated claimant on March 8, 2004. He concluded in his report that “overall, by parent report, school report, and the results of this evaluation, findings are consistent with the previous evaluation diagnosis of:

- AXIS I:
1. Attention-Deficit/Hyperactivity Disorder, Combined Type (314.01).
 2. Reading Disorder (315.00).

3. Mathematics Disorder. (315.1).
4. Disorder of Written Expression.
5. Obsessive-Compulsive Disorder, by history (300.3).

AXIS II: No diagnosis or condition on Axis II (V71.09).

AXIS III: See Medical Report

Eligibility Based on Mental Retardation

15. Dr. Glidden's report contained, in part, the following information regarding claimant's intellectual functioning:

On the Wechsler Adult Intelligence Scale-III (WAIS-III), [claimant] obtained a Full Scale IQ of 84 (14th percentile), which corresponds to the Low Average range of intellectual functioning. She obtained a Verbal Scale IQ of 76 (5th percentile, Borderline range), and a Performance Scale IQ of 97 (42nd percentile, Average range). Results of intellectual testing indicate that [claimant's] level of ability on verbal comprehension measures (Verbal Comprehension Index = 89, Low Average range), is consistent to her level of ability on perceptual-organization (nonverbal) measures (Perceptual Organization index = 95, Average range).

Subtest scores ranged from 3 to 12 and from the Extremely Low to High Average levels of ability. [Claimant] had the greatest degree of difficulty on subtests requiring verbal attention. The variability among subtest scores is significant and, as such, [claimant's] Full Scale IQ should not be viewed as representative of her "average" level of intellectual ability. In that attentional limitations negatively influence performance on verbal and nonverbal measures alike, [claimant's] Full Scale IQ as before, is felt to be an underestimate of her true level of cognitive potential.

16. On December 7, 2010, when claimant was 21 year old, Dr. Glidden conducted a neuropsychological re-evaluation. He noted the following information regarding claimant's intellectual functioning at that time:

On the Wechsler Adult Intelligence Scale-IV, [claimant] obtained a Full Scale IQ of 75 (5th percentile), which corresponds to the Borderline range of intellectual functioning. She obtained a

Verbal Comprehension Index score of 72 (3rd percentile, Borderline range), and a Perceptual Reasoning Index score of 90 (25th percentile, Average range). Results of intellectual testing indicate that [claimant's] level of ability on verbal comprehension measures is inferior to her level of ability on perceptual-organizational (nonverbal) measures. This is consistent with history of language delay, hearing challenges and global learning disabilities. . . The variability among subtest scores is significant and, as such, [claimant's] Full Scale IQ should not be viewed as indicative of her "overall" level of intellectual ability.

17. Dr. Glidden reported that claimant "graduated from Hanford West High School in 2008, having received considerable support to do so. She then attempted college on three occasions and left each time. She requires prompting for activities of daily living and exhibits emotional dysregulation at times," He concluded as follows:

The results of this evaluation do indicate [claimant] is functioning at a lower level than she had on previous assessments. This does not appear to represent a loss of capacity, but rather a change in the level of structure that has been afforded throughout her academic career. [Claimant] enjoyed considerable support at school and home to plan, organize and complete work. Since graduation, the level of support from school has declined, as she is now able to withdraw from school when work becomes more difficult. Additionally, in the home, as [claimant] has reached the age of majority, she has more "say" in how she spends her time. It is, more likely than not, this lack of external structure which had been "supporting" [claimant], which subsequently has been withdrawn, has led to a decline in functional capacity. This is evident in cognitive measures as well as adaptive and social functioning.

18. Dr. Sharp testified that Dr. Glidden's neuropsychological testing results conclude that claimant does not have mental retardation. The diagnostic criteria for "Mental Retardation" as set forth in section 4512 is defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) to require:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test...

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her culture group) in at least two of the following areas: communication, self-care,

home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before 18 years.

19. Dr. Sharp noted that the testing completed immediately prior to claimant's eighteenth birthday showed a Full Scale IQ score of 84 which is not in the range of an individual with mental retardation. She also emphasized and agreed with Dr. Glidden's belief that due to the variability in her subtest scores, this Full Scale score was felt to be an underestimate of her true level of cognitive functioning. Dr. Sharp explained that the significant "scatter" in subtest scores most likely evidences learning disabilities and would be consistent with claimant's history of sensory impairments in hearing and vision.

20. The DSM-IV-TR provides a multi-axial classification system consisting of five axes which each refer to a different domain of information. Mental Retardation is reported on Axis II. Dr. Glidden's evaluations specifically noted "No diagnosis or condition on AXIS II."

21. The evidence presented demonstrates that claimant is not eligible for CVRC services based upon a diagnosis of mental retardation.

Eligibility Based on the "Fifth Category" (A Disabling Condition Found to be Closely Related to Mental Retardation or to Require Treatment Similar to Mental Retardation)

22. In addressing eligibility under the fifth category, the Court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, stated in part:

...The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

23. Dr. Sharp testified that CVRC follows guidelines for determining "Fifth Category" eligibility that were established by the Association of Regional Center Agencies. She opined that a condition closely related to mental retardation would require the essential feature of sub-average general intellectual functioning, accompanied by "significant deficits in adaptive skills including, but not limited to, communication, learning, self-care, mobility self-direction, capacity for independent living, and economic self-sufficiency." The eligibility team must demonstrate that these "substantial adaptive deficits are clearly related to cognitive limitations" and must not be the result of mental health issues, learning disabilities or physical conditions.

24. Claimant did not demonstrate a degree of global intellectual impairment similar to that possessed by persons with mental retardation.

25. It was not disputed that claimant exhibits deficits or impairments in her adaptive functioning such that she is not effectively meeting the standards of personal independence expected of a young woman of her age in her community. Dr. Sharp opined that there may be a variety of reasons for deficits in adaptive functioning which may occur even in the absence of significant deficits in cognitive ability. In this case, claimant has been diagnosed with mental health disorders, physical disabilities and learning disorders. Dr. Sharp testified persuasively that claimant's adaptive deficits most likely derive from these diagnoses rather than a condition closely related to mental retardation.

26. Dr. Sharp also testified that claimant does not require treatment similar to that required for individuals with mental retardation. She opined that a similar treatment would be inappropriate for claimant's functioning level and that claimant's limiting conditions would be better served from a treatment perspective of one with psychiatric disorders, sensory impairments, and learning disorders. These treatments would not be the same or similar to those required by individuals with mental retardation.

27. It was not established that claimant's adaptive deficits were consistent with fifth category eligibility. They appear to derive from other established conditions, including mental health disorders, learning disabilities and physical/sensory impairments, rather than a condition similar to mental retardation. Nor were the treatments required for these conditions demonstrated to be similar to those specifically required by an individual with mental retardation.

Eligibility Based on Autism

28. Claimant was seen by Dr. Prasad Reddy, M.D., in Visalia on March 1, 2011, at age twenty-one. Dr. Reddy's signed SOAP notes for that date indicate that the reason for the referral was "behavioral problems." They also showed an AXIS I diagnosis of "Autistic disorder, mood disorder NOS." There was no evidence of any testing performed by Dr. Reddy in making that determination, nor any other explanation or analysis for his conclusion.

29. DSM-IV-TR section 299.00, Autistic Disorder, states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests . . . The impairment in reciprocal social interaction is gross and sustained. . . The impairment in communication is also marked and sustained and affects both verbal and nonverbal skills.

To diagnose Autistic Disorder, it must be determined that an individual has at least two qualitative impairments in social interaction; at least one qualitative impairment in communication; and at least one restricted repetitive and stereotyped pattern of behavior, interests, or activities. One must have a combined minimum of six items from these three categories. In addition, delays or abnormal functioning in at least one of the following areas, with onset prior to age three, is required: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

30. In light of the lack of a demonstrated factual basis for Dr. Reddy's determination and claimant's age at the time of "diagnosis" there was no credible evidence submitted to demonstrate that claimant meets the diagnostic criteria for autism. In addition, Dr. Glidden, after evaluating claimant on several occasions, made no findings of autism.

31. There was undisputed evidence that claimant suffered from complex partial seizures from approximately age two until age eight. That condition has resolved and there was no evidence presented to demonstrate that claimant is eligible for CVRC services based upon a diagnosis of epilepsy or cerebral palsy.

32. Claimant's mother testified that her daughter "needs help and she is trying to get her the help she needs." She presented as a very caring and concerned parent who believes that CVRC services should be made available to claimant.

LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the "fifth category"], but shall not include other handicapping conditions that consist solely physical in nature.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2 A learning disability does not qualify as a developmental disability, as that term is defined in section 4512, subdivision (a), and in fact is specifically excluded under California Code of Regulations, title 17, section 54000, subdivision (c)(2). Likewise, conditions which are solely psychiatric disorders and which impair intellectual functioning or social functioning or are solely physical in nature are specifically excluded under California Code of Regulations, title 17, section 54000, subdivisions (c)(1) and (c)(3).

3. The evidence was persuasive that claimant has significant limitations. She has been diagnosed with ADHD, Obsessive-Compulsive Disorder, several learning disorders and has an extensive medical history which includes Noonan's Syndrome and sensory impairments of hearing and vision. While she is certainly impaired by those conditions, the evidence did not prove that claimant's current impairments resulted from a qualifying condition which originated and constituted a substantial disability before the age of eighteen. There was no evidence to support a finding of mental retardation or a condition closely related to mental retardation, or that requires treatment similar to that required for individuals with mental retardation. It was not established that claimant has autism, cerebral palsy or epilepsy. Accordingly, she does not have a developmental disability as defined by the Lanterman Act and is not eligible for services through CVRC.

ORDER

Claimant's appeal from the Central Valley Regional Center's denial of services is denied.

DATED: May 16, 2011

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)